

**STATE OF VERMONT  
BOARD OF MEDICAL PRACTICE**

In Re: )  
DAVID S. CHASE, ) Docket No. MPC 15-0203, et al.  
Respondent )

**DECISIONS ON RESPONDENT'S AND  
THE STATE'S PRE-HEARING MOTIONS**

In preparation for the Administrative Hearing on the Merits of the pending Specification of Charges against Respondent, a Status Conference was held on April 27, 2006, in order to schedule further proceedings. Pursuant to the Status Conference Report issued by the Board Hearing Committee, the parties filed numerous pre-hearing motions. The Board Hearing Committee met via telephone conference on June 29 and July 6, 2006, in order to deliberate on and decide all pending motions. Sharon L. Nicol, Public Member; Alexander Northern, Public Member; and Dewees H. Brown, Ad Hoc Physician Member served on the Hearing Committee. Phillip J. Cykon, Esq. served as Presiding Officer for the Committee.

The decisions concerning the motions appear below in the order in which they were addressed by the Board Hearing Committee.

1. DR. CHASE'S MOTION FOR BOARD MEMBER SHARON NICOL TO RECUSE HERSELF OR, IN THE ALTERNATIVE, BE DISQUALIFIED FROM PARTICIPATING IN THE MERITS HEARING PANEL.

Respondent moves Board member Nicol to either recuse herself or be disqualified from serving on the merits hearing panel. Respondent contends that since Ms. Nicol participated in the summary suspension of Respondent's license and, as a result, may be civilly sued by Respondent in a civil rights action, she cannot fairly and impartially sit on the merits hearing panel. Respondent further contends that as a potential defendant, Ms. Nicol would have a pecuniary interest in the outcome of the merits hearing, and her presence on the merits hearing panel would create an intolerable risk of bias.

Respondent's recitation of the general law is correct in that a neutral, impartial decision-maker is important in satisfying due process requirements. As the Vermont Supreme Court has stated:

A fair trial before an impartial decisionmaker is a basic requirement of due process, applicable to administrative agencies as well as to the courts. *Withrow v. Larkin*, 421 U.S. 35, 46, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975). There is a presumption of honesty and integrity in those serving as administrative adjudicators. See *id.* At 47; see also

*Crushed Rock*, 150 Vt. At 622, 557 A.2d at 89 (applying *Withrow* presumption of honesty and integrity). Defendants have the burden of overcoming the presumption by establishing an interest that requires disqualification. (citations omitted).

Secretary v. Upper Valley Regional Landfill Corp., 167 Vt. 228, 234-35 (1997). However, in this same case, the Court was clear regarding possible lawsuits being brought against a decisionmaker and has rejected the contention that such lawsuits could prevent a decisionmaker from hearing the merits of a case.

A judge cannot be disqualified merely because a litigant sues or threatens to sue him or her. *In re Vermont Sup. Ct. Admin. Directive No. 17*, 154 Vt. 217, 226, 576 A.2d 127, 132 (1990); see also *In re Illuzzi*, 164 Vt. 623, 624, 670 A.2d 1264, 1265 (1995) (requiring disqualification when litigant sues or threatens to sue judge would allow manipulation of courts and judge shopping).

Regarding Ms. Nicol's earlier participation in the summary suspension proceeding, the Court has been equally clear that the type of personal knowledge acquired by a decisionmaker in that manner has not been acquired extrajudicially and, as such, does not demonstrate bias that requires disqualification. "Information acquired from earlier judicial proceedings by a trial judge's participation in a case is not extrajudicial or, in the usual case, evidence of bias." State v. Savo, 150 Vt. 610, 611 (1987). See also In re Odessa Corp., 2006 VT 35, ¶ 13.

After reviewing the facts set forth by Respondent and the Vermont Supreme Court cases addressing disqualification, Respondent has failed to overcome the presumption of honesty and integrity, has failed to establish that Ms. Nicol is biased, and has failed to show any reason why Ms. Nicol is not able to sit on the Hearing Panel and serve fairly and impartially. Respondent's motion for recusal or disqualification of Ms. Nicol is DENIED.

## 2. STATE'S MOTION FOR ADMISSION OF DEPOSITIONS OF STEPHEN GREEN AS EVIDENCE.

The State requests that two previous depositions of the witness Stephen Green be admitted as evidence. Apparently, Mr. Green has moved out of Vermont and has indicated that he does not intend to return to Vermont to testify at the hearing on the merits of this case. The State contends that Mr. Green is thus unavailable as a witness under V.R.E. 804(a)(5), and therefore, his deposition testimony is admissible under V.R.E. 804(b)(1). The State further suggest that the depositions may be admitted under 3 V.S.A. § 810(1), since "it is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs."

Respondent objects to the admission of this deposition testimony on the grounds that Mr. Green is not unavailable as required by V.R.E. 804(a)(5); that the depositions were not taken in

compliance with law in that Mr. Green never signed them; that Respondent did not have an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination as required by V.R.E. 804(b)(1); and that the depositions do not fall under the evidentiary exception set forth in 3 V.S.A. § 810(1).

3 V.S.A. § 810(3) states that a party in a contested administrative case “may conduct cross-examinations required for a full and true disclosure of the facts. Considering the facts surrounding the depositions of Mr. Green as set forth in the parties’ motions, the Committee feels that the depositions alone would not guarantee a “full and true disclosure of the facts.” It is not clear that Respondent had the opportunity and a similar motive to conduct a full examination of Mr. Green at the previous depositions. Furthermore, the absence of Mr. Green’s signature upon those depositions diminishes the extent to which a reasonably prudent person would rely upon them. The direct and cross examination of Mr. Green in person before the Hearing Committee would better serve the present inquiry; therefore, the State’s motion to admit the depositions is DENIED.

3. DR. CHASE’S MOTION TO REQUIRE THE STATE TO PROVIDE AN UPDATED WITNESS LIST AND ORDER OF CALL.

As has been addressed in previous decisions and reports, both parties should provide each other with updated witness lists as appropriate. It is so ordered again. The State has affirmed in its current responses that it has identified all witnesses that it intends to call at the merits hearing. It is anticipated Respondent has done the same. As for the request to provide each other with their anticipated order of call at least two days before each hearing day, the State has agreed to do so. It is anticipated that Respondent will reciprocate in that fashion. To this extent, the motion is GRANTED.

4. DR. CHASE’S MOTION TO EXCLUDE PHOTOCOPIES OF MEDICAL RECORDS FROM EVIDENCE.

Respondent has failed to demonstrate how he is prejudiced by the admission of photocopies. Unless there is some evidence that questions the authenticity and accuracy of the photocopies, they are admissible under V.R.E. 1003. Respondent can organize or have the photocopies organized in the manner that he wants them presented as evidence to the Hearing Committee. His motion to exclude the photocopies is DENIED.

5. DR. CHASE’S MOTION FOR DISCLOSURE OF ALL EXCULPATORY INFORMATION AND WITNESS STATEMENTS IN THE POSSESSION OR CONTROL OF THE BOARD OR THE STATE.

As has been previously decided, a Board licensee is entitled to receive certain information under 26 V.S.A. ' 1318(e), which reads in relevant part as follows:

A licensee ... shall have the right to inspect and copy all information in the possession of the department of health pertaining to the licensee ..., except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.

See also Board Rule 19.1. Respondent is entitled to have access to the material described in the above-quoted statute; therefore, to this extent, Respondent's motion is GRANTED.

6. RESPONDENT'S MOTION TO EXCLUDE TESTIMONY OF WITNESSES WHO HAVE DENIED DR. CHASE UPDATED ACCESS TO THEIR MEDICAL RECORDS.

This issue has been raised several times before. The Committee will reiterate the substance of the previous decisions. Respondent bases this request on law related to civil malpractice actions and other actions covered by the Vermont Rules of Civil Procedure. At the outset, the civil rules of procedure are inapplicable to administrative hearings. Condosta v. D.S.W., 154 Vt. 465,467 (1990) and International Assoc. of Firefighters Local #2287 v. Montpelier, 133 Vt. 175, 177 (1975). The rights provided under VAPA and the preponderance of evidence burden of proof placed on the State comply with "the constitutional process due" to the Respondent. In re Smith, 169 Vt. 162, 172 (1999).

As the Board has established in previous rulings in this matter, it does not have a general grant of authority to provide for the full arsenal of discovery methods and tools that are available under the rules of civil procedure. A Board licensee is entitled to receive certain information under 26 V.S.A. § 1318(e), which reads in relevant part as follows:

A licensee ... shall have the right to inspect and copy all information in the possession of the department of health pertaining to the licensee ..., except investigatory files which have not resulted in charges of unprofessional conduct and attorney work product.

See also Board Rule 19.1. The Attorney General's Office has represented in hearing that it has provided everything that Respondent is entitled to under this statute. Previously, both parties at this motion hearing represented that the patients' in question and their attorneys were willing to sign a limited release to allow Respondent certain access to medical records. The Board has no control over what these patients will or will not do.

The Vermont Administrative Procedure Act (VAPA) does not establish any type of discovery procedure that would give the Board the authority to compel what Respondent requests. VAPA does provide for the enforcement of agency subpoenas regarding testimony and production of documents. 3 V.S.A. § 809a. A Board statute, 26 V.S.A. § 1353(3), does grant the Board the power to "[T]ake or cause depositions to be taken as needed in any investigation, hearing or proceeding." Board Rule 16.2 covers "Discovery" and authorizes the Board or legal

counsel to “issue orders regulating discovery and depositions.” These are the procedures that the Vermont Legislature gave the Board to carry out its administrative responsibilities. These are the procedures that are available for Respondent and the State to use to prepare for hearing. The Board does not have the authority to order patients to release their medical records or to submit to an independent medical examination. If the Legislature had intended the Board to exercise such intrusive procedures, it would have specifically granted such authority.

The Board notes that these issues were raised at the Prehearing Conference held on 11/12/03 and discussed in the Board’s Order Re Respondent’s Motion to Compel issued shortly thereafter. In addition, the issue of independent medical examinations was raised at the prehearing conference on 12/16/03 and discussed in the Board’s Prehearing Conference Report issued shortly thereafter. The issues were addressed again at the motions hearing on 8/12/04 and the subsequent decision. Respondent has been given adequate notice of the procedures that should be utilized to acquire the information he seeks in this matter.

As for the exclusion of evidence at this stage of the proceeding, neither the state of the evidence nor the law governing administrative hearings support Respondent’s request. The Board further notes that Respondent will have full opportunity to cross-examine witnesses and introduce his own evidence at the disciplinary hearing, at which the State must prove its allegation by a preponderance of the evidence.

The Committee states again that the combination of rights and procedures that have been and are being provided to Respondent prior to the hearing on the merits, and that which will be provided at the merits hearing go beyond the administrative hearing contemplated by the U.S. Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970) and Mathews v. Eldridge, 424 U.S. 319 (1976). As stated in several of the Board’s prior decisions, it is up to the Respondent to afford himself of these rights and procedures. Respondent’s motion to exclude testimony is DENIED.

7. STATE OF VERMONT’S MOTION IN LIMINE – EXCLUSION OF WITNESSES DISCLOSED BY RESPONDENT ON FEBRUARY 8, 2006.

The State moves to exclude the testimony of witnesses disclosed by Respondent via letter dated February 6, 2006. At the Status Conference held on January 11, 2006, as reflected by the Status Conference Report dated January 13, 2006, Respondent was permitted to “file ... any amendments to his witness list ... on or before 2/8/06.” Respondent did so in a timely manner. The State has failed to show how it is has been prejudiced by the amendment to Respondent’s witness list; therefore, this motion is DENIED.

8. STATE OF VERMONT’S MOTION IN LIMINE – LIMITATION OF EXPERT TESTIMONY OF JAMES FREEMAN, M.D.

It is anticipated that Respondent will be offering and will limit the testimony of Dr. James Freeman to matters relevant to the pending allegations; therefore, the State’s motion is DENIED.

9. STATE OF VERMONT’S MOTION IN LIMINE – EXCLUSION OF EXPERT TESTIMONY OF DAVID EVANS, PhD; ARTHUR GINSBERG, PhD; AND JONATHAN JAVITT, M.D.

The State’s motion with regard to Dr. Javitt is DENIED. His testimony relating to the relevant testing will provide useful information regarding the issue of its medical and scientific validity. As far as the testimony of David Evans and Arthur Ginsberg, those motions are GRANTED, in that such testimony would be cumulative and unduly repetitious, and is excluded under V.R.E. 403 and 3 V.S.A. § 810(1).

10. STATE OF VERMONT’S MOTION IN LIMINE – EXCLUSION OF TESTIMONY OF FORMER PATIENTS AS NOT RELEVANT TO THE TWELVE CASES THAT ARE THE SUBJECT OF THE AMENDED SUPERCEDING SPECIFICATION OF CHARGES.

The testimony of patients who are not subjects of the pending allegations is not relevant to Respondent’s conduct in relation to the patients who are subjects of the allegations. It is excluded under V.R.E. 402 and 3 V.S.A. § 810(1). The State’s motion is GRANTED.

11. STATE OF VERMONT’S MOTION IN LIMINE – ADMISSION OF TRIAL TRANSCRIPTS IN LIEU OF LIVE TESTIMONY SUBJECT TO CHALLENGES OF RELEVANCY.

As addressed above, 3 V.S.A. § 810(3) states that a party in a contested administrative case “may conduct cross-examinations required for a full and true disclosure of the facts.” To the extent that the parties can agree, “evidence may be received in written form.” 3 V.S.A. § 810(1). Otherwise, the risk of substantial prejudice is too great. For these reasons, the State’s motion is DENIED.

12. STATE OF VERMONT’S MOTION IN LIMINE – ADMISSION OF RECORDS OF SECOND-OPINION DOCTORS IN LIEU OF LIVE TESTIMONY.

As addressed above, 3 V.S.A. § 810(3) states that a party in a contested administrative case “may conduct cross-examinations required for a full and true disclosure of the facts.” To the extent that the parties can agree, “evidence may be received in written form.” 3 V.S.A. § 810(1). Otherwise, the risk of substantial prejudice is too great. For these reasons, the State’s motion is DENIED.

13. STATE OF VERMONT’S MOTION IN LIMINE – ADMISSION OF STATEMENTS OF RESPONDENT’S COUNSEL IN THESE PROCEEDINGS AND IN OTHER PROCEEDINGS AS ADMISSIONS BY A PARTY OPPONENT.

Admissions of a party opponent are generally admissible; however, the Committee will

rule at the merits hearing whether or not a particular statement satisfies V.R.E. 801(d)(2)(D) and whether or not the particular statement is relevant. To the extent that the Board will consider the admissibility of each statement on a “case-by-case” basis, the State’s motion is GRANTED.

SO ORDERED BY THE BOARD HEARING COMMITTEE.

WRITTEN ORDER PREPARED BY PRESIDING OFFICER PURSUANT TO BOARD RULE 16.2 AND 16.3, AND IN ACCORDANCE WITH THE DELIBERATIONS OF THE BOARD HEARING COMMITTEE

Phillip J. Cykon

July 12, 2006

Phillip J. Cykon, Esq., Presiding Officer

Date